SUPREME COURT, U.S.
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NO. 92-1370

IN THE SUPREME COURT OF THE UNITED STATES
October 1992 Term

In re:

BFP, A Partnership,

Debtor.

BFP, A Partnership,

Petitioner and Plaintiff

vs.

RESOLUTION TRUST CORPORATION as Receiver of IMPERIAL SAVINGS & LOAN ASSOCIATION; PAUL OSBORNE; WILLIAM LITTLE; DENNIS ROY; ARTHUR RITZ; JOSE CRUZ; RICHARD MARCZ,

Respondents and Defendant

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF OF PETITIONER BFP AND APPENDICES

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Petition for Certiorari filed February 16, 1993

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REPLY BRIEF OF PETITIONER BFP

Petitioner, BFP, replies to the briefs herein referred to as "Osborne"[1] "RTC"[2], "Am. Council"[3], "Council of States"[4], "Fed. Home"[5], "Cal. Trustees"[6],

---

1. Respondents, PAUL OSBORNE, WILLIAM LITTLE, DENNIS ROY, ARTHUR RITZ, JOSE CRUZ and RICHARD MARCZ

2. Respondent, RESOLUTION TRUST CORPORATION

3. Amici AMERICAN COUNCIL OF LIFE INSURANCE and AMERICAN COLLEGE OF REAL ESTATE LAWYERS

4. Amici COUNCIL OF STATE GOVERNMENTS, NATIONAL GOVERNORS' ASSOCIATION, NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, U. S. CONFERENCE OF MAYORS, AND THE INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION

5. Amici FEDERAL HOME LOAN MORTGAGE CORPORATION, MORTGAGE BANKERS' ASSOCIATION OF AMERICA, SAVINGS & COMMUNITY BANKERS OF AMERICA, and AMERICAN LAND TITLE ASSOCIATION

6. Amici CALIFORNIA TRUSTEE'S ASSOCIATION, CALIFORNIA LAND TITLE ASSOCIATION, CALIFORNIA BANKERS' ASSOCIATION, MORTGAGE INSTITUTE OF CALIFORNIA and CALIFORNIA INDEPENDENT MORTGAGE BROKERS' ASSOCIATION

and "Walter"[7] as follows:

BFP replies under titles substantially as used in BFP's Brief and new I-K. A Table of References to Briefs follows the Table of Authorities herein.

Because of the difficulty in replying to 185 printed pages in the allowed 20 printed pages (45 typed), BFP asks this Honorable Court to forgive BFP for giving multiple citations only in the Table of Authorities and not to assume that failure to reply to an argument is an admission.

STATEMENT OF THE CASE, B. FACTS

The excess of the bid over the amount due is said to have been "made available" to the junior trust deed holder (Osborne p. 3, 19) although not received (J.A. p. 324).

7.Amicus JIM WALTER HOMES, INC.

Osborne refers to BFP's "second" bankruptcy (Osborne pp. 2-3). The first was involuntary, by an assignee of a partner; the other partner objected successfully (paragraphs 17-24 and 28-31 of Complaint, J.A. pp. 53-61).

The required statutory notices were given (Osborne p. 3, f.n. 1), however, BFP's requested notice of continued sale dates was not given (F herein).

Osborne erroneously claims there was an evidenciary hearing (Osborne p. 20).

ARGUMENT

A. UNDER THE APPLICABLE STANDARD OF REVIEW, CONFLICTS IN EVIDENCE ARE RESOLVED AND INFERENCES MADE IN FAVOR OF THE PARTY RESISTING THE MOTIONS, PETITIONER BFP.

The principle of Conley v. Gibson, 355 U.S.41 (Osborne p. 21), although on a judgment on the pleadings, is applicable to dismissals.

B. THE PLAIN LANGUAGE OF 11 U.S.C. 548 (a)(2) IS THAT A FORECLOSURE

SALE DOES NOT ESTABLISH THE REASONABLY EQUIVALENT VALUE NOR AN IRREBUTTABLE PRESUMPTION THEREOF.

Whether a foreclosure sale is a transfer is considered in E herein.

1. UNAMBIGUOUS LANGUAGE OF A STATUTE GOVERNS ITS INTERPRETATION.

Respondents concede that the starting point in statutory interpretation is the language of the statute (Osborne, p. 6; Am. Council p. 7; Walter pp. 1-8). Osborne quotes Ardestani v. I. N. S., ___ U.S. ___, 116 L.Ed. 2d 496 (1991). Absent expressed contrary intent, the inquiry ends there. In United States v. Ron Pair Enterprises, Inc., 489 U.S. 235 (1989) (Osborne p. 11, Walter p. 22) the court applied statutory language saying:

> "[2] The plain meaning of legislation should be conclusive, except in the 'rare' cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intention of its drafters."

Debates, reports, reasons for a

bill, and purpose must give way to the language; MacKenzie v. Hare, 239 U.S. 299, 308 (1915).

The plain language of the statute governs. Connecticut National Bank v. Germain, 503 U.S. __, 117 L.Ed.2d 391, 397-398 (1992); United States v. Rutherford, 442 U.S. 544, 551-52 (1979); Malat v. Riddell, 383 U.S. 569 (1965) and Helvering v. Hammel 311 U.S. 504, 510, 511 (1941).

Respondents ignore the plain, clear language of 11 U.S.C. 548(a)(2) that the trustee may avoid (1) "any transfer," (2) of an interest of debtor in property, (3) within one year before the filing of a petition in bankruptcy (4) if debtor received less than reasonably equivalent value, and (5) debtor was or thereby became insolvent.

2. THE FEDERAL LAW, NOT THE STATE LAW, GOVERNS; 11 U.S.C. 548 SHOULD NOT BE HARMONIZED WITH STATE LAW.

RTC admits or contends that it would be appropriate to avoid sales that can be avoided under state law, Congress respects state law and avoidance of properly conducted sales would intrude on state powers (RTC f.n. 11, p. 14). Others boldly assert that Congress intended by 11 U.S.C. 548 only to apply state law of fraudulent conveyances and not to avoid regularly conducted foreclosures (Osborne pp. 12 and 14; Council of States pp. 8-19; Cal. Trustees p. 7; Walter pp. 1-3, 17-23). Respondents ignore the basics of bankruptcy. In chapter 7, debts may be discharged and in Chapter 11, they may be reduced by cram down contrary to state law. Respondents' argument defies the unambiguous language of 11 U.S.C. 548(a)(2) which creates a federal standard of reasonably equivalent value. Matter of Bundles, 856 F.2d 815, 822 (7th Cir. 1988).

Under 11 U.S.C. 542 the trustee has all of the powers of the debtor to avoid transfers; Camp v. St. Paul Fire and Marine Ins. Co., 989 F.2d 428, 429 (11 Cir. 1993); and under 11 U.S.C. 544(b) the rights of unsecured creditors; 11 U.S.C. 544(b); Lippi v. City Bank, 955 F.2d 599, 608 (9th Cir. 1992).

Rake v. Wade, __ U.S. __, 124 L.Ed.2d 424 (1993) is cited as harmonizing with state law (Osborne pp. 15, 16, 17). It did not apply state law and held that 11 U.S.C. 506(d) and 1322(b) require interest be paid.

Midlantic Nat. v. New Jersey Department, 474 U.S. 494, 505 (1986) (Osborne p. 11) is cited for the rule that Congress did not intend to change a "judicially-created concept" referring to a state environmental statute. The court said:

> "Title 28 U.S.C. Section 959(b) . . . commands the trustee to

> 'manage and operate the property in his possession . . . according to the requirements of the valid laws of the state.'. . . "

There, state law was expressly spared from preemption.

Section 548 provides for avoidance in bankruptcy of transfers for less than reasonably equivalent value, contrary to those state laws which hold that inadequacy of price alone is not a basis for setting aside foreclosures in an action by transferor (or by his creditors).

Dewsnup v. Timm, 116 L.Ed.2d 773 (1992) is said to voice concern for fundamental states' rights, show the Bankruptcy Code does not preempt state law and that no change was intended by Section 548 (Walter pp. 17, 20, 22; Fed. Home p. 22; Osborne p. 16 f.n. 6 and 17; Am. Council p. 15). Respondents' conclusion is incorrect. There, a Chapter 7 debtor sought to "strip down" a secured

creditor. This Court held that "allowed" in 11 U.S.C. 506(d) refers to the "allowed" in 11 U.S.C. 502, not 506(a) and the secured party keeps his security.

California Savings & Loan Ass'n v. Guerra, 479 U.S. 272, 280-81, 292 (1987) is cited to show that state law is not preempted (Osborne p. 10). BFP does not assert any preemption of state laws. State laws govern actions by a transferor or his creditors to avoid a conveyance. Once bankruptcy is filed, the trustee in bankruptcy has powers under 11 U.S.C. 548 to avoid certain foreclosures.

The case on review is said to be in the posture of U. S. v. Ron Pair Enterprises, Inc., 489 U.S. 235 (1989) (Walter p. 22) which said that 11 U.S.C. 506(d) requires interest even if the agreement [under state law] does not. Section 548 gives power to avoid a transfer for less than reasonably equivalent value while

generally state laws do not.

In Security Mortgage v. Powers, 278 U.S. 149 (1926) (Osborne p. 13), this court said that the validity of a lien is determined by state law and enforcing it in bankrukptcy against proceeds of sale, of the secured property raises federal questions peculiar to bankruptcy law.

Congressional silence is said to accept Madrid (Osborne p.17). Dewsnup and cases cited in B.1 above show it does not where, as here, the statute is clear. Also, if any law were accepted by silence, Durrett was accepted; the 1984 amendment made the rule of Durrett more clearly applicable.

Butner v. United States, 440 U. S. 48, 54 (1979), (Osborne pp. 16, f.n. 1, p. 25; Walter pp. 18, 22, 23) held that state law determines whether the mortgagee had a right to rents collected during the mortgagor's bankruptcy saying:

> "The constitutional authority of Congress to establish uniform laws on the subject of bankruptcies throughout the United States would clearly encompass a federal statute defining a mortgagee's interest in rents and profits earned by property in a bankruptcy estate. . . . The Bankruptcy Act does include provisions invalidating certain security interests. . . "[8]

In said footnote 8, the Court said:

> "Sections 107(a) and (b) invalidating certain liens . . . and certain fraudulent transfers . . . "

Butner was cited in Barnhill v. Johnson, 503 U.S. ___, 118 L.Ed.2d 39, 46 (1992), where this court said that what is a transfer is a matter of federal law.

Definitions in dictionaries and court decisions may be considered as to meaning of words. Thus, in holding children as used in federal statute on succession to a copyright included illegitimate children, DeSylva v. Ballantine, 351 U.S. 570, 581 (1955) (Council of States pp. 4, 12) the court said:

> "That does not mean that a state would be entitled to use the word

> "children" in a way entirely strange to those families with its ordinary usage."

Surely, one could not look to the rule that "inadequacy of price alone" is not a ground for avoiding a sale, to interpret the rule that lack of "reasonably equivalent value" is a ground for avoidance.

In Nobleman v. American Savings Bank, 508 U.S. ___, 124 L.Ed.2d 228 (1993) (Walter, pp. 17-18; Fed. Home p. 22; see also Osborne, p. 14), this Court pointed out that Bankruptcy Code's automatic stay and debtor's right to cure prepetition defaults affect mortgagee's rights. Here, controlling federal law defines transfers and provides that certain transfers for less than reasonably equivalent value are avoidable; admittedly bankruptcy law may alter state law (Walter p. 25, 26, 27).

Cipollone v. Liggett Group, Inc., ___ U.S. ___, 120 L.Ed.2d 407 (1992) (RTC

p. 8; Council of States pp. 3-8; Walter p. 28) this court said that Congress' express preemption indicates an intent not to preempt other matters and there is a presumption against preemption of state police power. That case does not help Respondents because the court looked to the statutory language first (clear in the matter on review) and, unlike police powers, the Constitution gives Congress power to establish bankruptcy laws (U. S. Constitution, Section 8, clauses 1-4).

Kelly v. Robinson, 479 U.S. 36, (1986) (Council of States p. 21 and passim) held that under 11 U.S.C. 523(a)(7) nondischargeability was subject to interpretation. Here the amount to be reasonably equivalent is subject to interpretation but the type of transaction is not; foreclosures are included.

Lewis v. Manufacturers National Bank of Detroit, 364 U.S. 603, 609 (1961)

referred to avoiding powers under 67d of the Bankruptcy Act as a power given trustees which creditors do not have.

Kupetz v. Wolf, 845 F.2d 842, 845 (9th Cir. 1988) (Cal.Trustees pp. 6, 7, 16, 18) (authored by the Judge who authored the opinion being reviewed) is cited for the statement that the purpose of 11 U.S.C. 548 and state law are the same (Cal. Trustees pp. 6, 7, 15, 16). The only case cited for that rule was Coder v. Arts, 213 U.S. 223, 241, (1909), decided before the avoidance powers under Bankruptcy Act applied to involuntary transfers. In Kupetz, a voluntary transfer was reviewed. An issue was the meaning of "fair consideration" in former Cal. Civil Code Sec. 3439.04 (Appendix D). "Reasonably equivalent value" seems more concerned with a comparison of values and less with circumstances of the transaction than "fair consideration".

Respondents cite no cases prior to the Uniform Fraudulent Transfer Act (of 1984), "UFTA" herein (App. E hereto), holding that the bid establishes "fair consideration", "reasonably equivalent value" or a presumption of such. The Uniform Fraudulent Conveyance Act, "UFCA" herein, Section 4 (App. C hereto) (and Cal. Civil Code Section 3439.04 from 1-1-40 to 1987) (App. D hereto) refers to "conveyance made". One might expect "conveyance made" to mean a voluntary transfer and not expect to find cases discussing the consideration or value received on foreclosure. The cases on foreclosure arising under the UFCA (App. C. hereto) BFP finds (with one exception) had aspects or badges of actual fraud; none of them discussed fair consideration. The exception is In re Christian, 48 B.R. 833, 835, headnote 6,

(D.C. Colo. 1985)[8] avoiding a foreclosure under 11 U.S.C. 548 but saying that a transfer had occurred under Colorado law.

Under the Bankruptcy Code, involuntary transfers are expressly subject to Section 548 avoidance powers.

If state law were held to govern, would the California version (effective 1-1-87) of the 1984 UFTA, apply in cases arising in California? California and all of the thirty states which adopted the UFTA by the end of 1992 adopted Section 1 providing that it applies to involuntary transfers; 3 states except foreclosures. Section 3(b) of the UFTA was not adopted in California (See Section 3439.04, App. F hereto), Arkansas

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8. 7a Uniform Laws Annotated shows Colorado as having adopted the UFTA in 1991 and does not show Colorado as having adopted the UFCA. Colorado could have adopted the UFCA after the book went to press and before Colorado adopted the UFTA.

and Montana (7a Uniform Laws Annotated 175). Said section 3(b) expressly provides that a noncollusive foreclosure establishes reasonably equivalent value.

Even under state law, emphasis on intent has changed to objectivity (see excerpts from Frank Kennedy, Appendix H hereto).

Recognition that 11 U.S.C. 548 creates a federal standard is in keeping with the constitutional authority to establish uniform laws on bankruptcies (Bankruptcy Act 1, Section 5, clauses 1 and 4). This court referred to the Bankruptcy Act as intended to have a uniform application McKenzie v. Irving Trust Co., 323 U.S. 365, 370 (1945) (and said that bankruptcy law determines what is a transfer).

3. PRIOR LAW DOES NOT MAKE FORECLOSURES IMMUNE FROM AVOIDANCE UNDER SECTION 548.

It is argued that Congress intended

no change in prior law by Section 548 (Osborne, p. 11, 13). See Midlantic v. New Jersey, (Osborne p. 11) and Dewsnup v. Timm, both discussed in B.1 and B.2 hereinabove. As said in Dewsnup (see B.2 above) silence in legislative history does not control unambiguous language of a statute.

Osborne cites (p. 11) United States v. Ron Pair Enterprises, Inc., supra, where in 109 S.Ct. at 1034 the Court said:

> ". . . the statute Congress wrote is simply not subject to a reading that would harmonize it with the supposed pre-Code rule."

There, this court was reluctant to interpret the Bankruptcy Code to effect a major change which is not the subject of at least some discussion in legislative history. However, this court said at the same page:

> ". . . of course, where the language is unambiguous, silence in the legislative history cannot be

controlling."

The statute before this court is unambiguous; therefore, it cannot be read to harmonize with state or other federal law and is unaffected by the alleged silence in history.

Durrett v. Washington National Ins. Co., 621 F.2d 201 (1980), although decided after Congress enacted 11 U.S.C. Section 548, arose under Section 67d of the Bankruptcy Act, then 11 U.S.C. 107(d), and held that a foreclosure sale could be avoided where the bid price was less than the "fair consideration".

Respondents contend that Congress took no action in spite of the 9th Circuit BAP case to the effect that the reasonably equivalent value was established by the foreclosure sale (Osborne p. 14). Congress did not take action to undo Durrett and other circuit courts which have held that the high bid does

not establish the reasonably equivalent value or any irrebuttable presumption with respect thereto.

After the Madrid decision, Congress enacted the Bankruptcy Administration and Federal Judges Act which added to 548 the words "voluntary or involuntary," and to the definition of transfers in section 101 the "foreclosure of debtor's equity of redemption."

To support Respondents' contention that under Section 67d of the Act, proper sales could not be set aside because of the values, they cite Security Mortgage v. Powers, 278 U.S. 149, 154, 156 (1928) (Osborne p. 13). There the dispute was not over avoidability of a sale or powers under Section 67d.

Respondents also cite in In re Soudan Mfg. Co., 113 F. 804, 808-809 (C.A.7th 1902) (Osborne p. 13). There, the issue was whether or not a claim was

secured, not avoidance of a sale.

Neither of the foregoing cases involved "fair consideration" or value. Both were decided before enactment of the Chandler Act which redefined transfers in former 11 U.S.C. 1 to include involuntary transfers.

Respondents cite no case showing that a foreclosure could not be avoided under Section 67 of the Bankruptcy Act; foreclosures could be avoided under that section. See Durrett, supra, and Frank Kennedy, Involuntary Fraudulent Transfers, 9 Cardozo Law Review 531, 547-550 (Appendix H hereto).

Gottlieb v.McArdle, 58 F.Supp. 1523, 1526 (1987) is cited (Osborne p. 28). In setting aside a foreclosure sale it said "federal" law requires "grossly inadequate price" without some other defect. The case under review turns on 11 U.S.C. 101 and 548, not other federal law.

4. PETITIONER DID NOT STATE THAT SECTION 548 REQUIRES MARKET VALUE; HOWEVER IT DOES REQUIRE REASONABLY EQUIVALENT VALUE AND SUCH WAS NOT RECEIVED IN THIS CASE.

Respondent claims BFP's position is that the purchase price was below market value (Osborne, p. 8), that "value" does not mean "market value" (Osborne, p. 9) and that since "reasonably equivalent value" does not mean market value, Petitioner's claim must be denied (Osborne, p. 10).

BFP understands that "value" and "reasonably equivalent value" are different. However, there is less difference than claimed by Respondents. In Ozark Restaurant Equipment Co., 850 F.2d 342, 345 (9th Cir. 1988) in reversing the Bankruptcy Court's determination (that a 7% markup on a sale should have been a 30%) the court remanded for recomputation using a 20% markup; the Court said:

> "Considering all of the factors bearing on the sale, did the debtor receive fair market value for the property. . . . Reasonably equivalent value depends on market conditions faced by a willing seller and a willing buyer. . . ."

In re Grabill Corp., 21 B.R. 983, 994, BLD #68639 (Bkrtcy. N.D.L. 1990) the court said of reasonably equivalent value that:

> ". . . the term means more than the 'consideration' necessary to support a contract. . . . 'reasonably equivalent' requires a comparison of the value of what went out with the value of what was received."

If what debtor receives "approximates" the value it gave, Section 548(a)(2) is satisfied as said in Mellon Bank v. Metro Communications, Inc., 945 F.2d 635 (3rd Cir. 1981), cert. den. (1992) (Osborne p. 7).

Rubin v. Manufacturers Hanover Trust Co., 661 F.2d 979, 991-92 (2nd Cir. 1981) said indirect benefit satisfied Bankruptcy Act Sec. 67d's requirement of "fair

consideration" provided the "value of the benefit received by the debtor approximates the value" given up.

"Reasonably" has been defined as probably, not possible: Kleinknecht v. Gettysburg College, 786 F.Supp. 449, 453 (M.D. Pa. 1992); Clement v. U. S., 980 F.2d 48, 54 (C.A.1st 1992); O'Dell v. De jeans's Packing Co., Inc., 585 P.2d 399, 402 (Okla. App. 1978). See also People v. Bennett, 58 C.A.3d 230, 238, 129 C.Rptr. 679 (1976).

Osborne concedes that equivalent means equal and yet contends that the bid of $433,600.00 was reasonably equivalent value (Osborne p. 6) without referring to the $725,000.00 alleged value (J. A. p. 59). The foreclosure bid was only 59.8% of said $725,000.00, 61.9% of the $700,000.00 per declaration resisting the Motion for Summary Judgment (J.A. 331) and 65.7% of the resale price,

$660,000.00 (J.A. 351).

The Bankruptcy Court did not consider what price may be reasonably equivalent. It merely ruled that it was bound by In re Madrid, 21 B.R. 423 (BAP 9th Cir. 1982) aff'd on the ground foreclosure is no transfer, 725 F.2d 1197 (CA 9th Cir. 1984) and In re Ehring 91 B.R. 897, (BAP 9th Cir. 1988), aff'd on ground of no preference, 900 F.2d 184. The former held that the high bid at the foreclosure established the reasonably equivalent value and the lead opinion in the latter (on preference under Section 547) that there was no transfer (BFP's Brief p. 45); the 9th Circuit said that foreclosure is a transfer. The bankruptcy judge in the case on review felt bound by the Madrid case as he had ruled in Kachanezadeh, 108 B.R. 734 (1989).

Respondents contend that there was evidence of competitive bidding at the

sale (Osborne p. 19). The only evidence of a bid was the one joint bid by the six Respondents.

Respondents criticize In re Lindsay, 98 B.R. 983, 981, (Bkrtcy. S.D. Cal. 1989) (Osborne p. 19). It is an excellent case on the law involved here. It correctly held that the BAP Madrid case on reasonably equivalent value was not stare decisis; Madrid was not final when appealed; it was affirmed only on another ground. In accord on stare decisis, In re Verna, 58 B.R. 246. If Lindsay erred on the law of stare decisis, it is no less persuasive.

The Respondents erroneously assert that Petitioner's bankruptcy schedules were before the court (Osborne p. 18-19). They were not before the Bankruptcy Court, although they were injected in Respondents' Appendix in the District Court (J.A. pp. 33-38).

Respondents state that Petitioner submitted no appraisals. Many cases say that the factors to be considered in determining if reasonably equivalent value was received (Osborne p. 19) include whether the foreclosing party obtained an appraisal, advertised, whether competitors' bidding was encouraged, and whether there was competitive bidding, e.g. see In the Matter of Bundles, 856 F.2d 815, 824 (7th Cir. 1988). Actually, the circumstances relevant are those showing the debtor's benefits and burdens (to measure values). See In re Vadnais Lumber Supply, Inc., 100 B.R. 127; Rubin v. Manufacturer's Hanover Trust Co., 661 F.2d 979 (2nd Cir. 1981).

That by foreclosing, the creditor is enforcing a procedure for "establishing the value" (RTC p. 16) is untrue. The creditor is trying to take the property or proceeds of sale without establishing

the value.

5. CASES HOLDING THAT THERE IS A PRESUMPTION IN FAVOR OF FORECLOSURES IN AN ACTION TO AVOID UNDER 11 U.S.C. 548 SHOULD BE DISAPPROVED; ANY INFERENCE OR PRESUMPTION SHOULD BE BASED ONLY ON THE RATIO OF BID TO VALUE OF PROPERTY.

Many misguided cases hold that there is a rebuttable presumption (and a few an irrebutable presumption) that the price paid at a foreclosure sale was the reasonably equivalent value under 11 U.S.C. Section 548. The better view is expressed in In re Steffens, 148 B.R. 144 (Bkrtcy. W.D. 1993) saying the court was:

> "neither prepared nor disposed to accept the premise that any regularly conducted foreclosure sale is prima facially immune from attack under Section 548(a)(2)."

The foreclosure sales price is not evidence of value. Wolf v. Aero Factors Corp., 126 F. Supp. 872, 878-79 (S.D.N.Y. 1954).

Under California law, on proof of a

substantial debt, a presumption of insolvency and lack of "fair consideration" arise: In re Consolidated Capital Equity Co., 143 B.R. 80, 87 (Bkrtcy N.D. Texas 1992).

The existence of a presumption, (even rebuttable) depends upon a rational nexus between proven fact and the presumed fact as held in Manley v. Georgia, 258 U.S.1, (1928) invalidating a criminal law (saying the rule applied to property), United Scenic Artists Local 829 v. N.L.R.B., 762 Fed.2d 1027, 1034 (DC Cir. 1985) in invalidating a presumption created by the National Labor Relations Board and Purifory v. Mercantile Safe Deposit and Trust Co., 398 F.S. 1082, 1085 (1955).

Arizona v. Maricopa County Medical Svc., 457 U.S. 332, 344-48 (1982) and Drabkin v. A. I. Credit Corp., 800 F.2d 1153 (D.C. Cir. 1986) (Fed. Home p. 16,

f.n. 15) both involved courts' experience that the presumed fact existed if the proven fact existed, reasons not present here.

It is contended that the value of the distressed property is the high bid (Fed. Home p.8; RTC p. 13; Am. Home p. 3) and value is in the context of the type of transaction (Fed. Home p. 11). Buyers know that debtors on a trust deed may cure defaults and reinstate the note, may stay a sale by agreement with the beneficiary, filing bankruptcy or otherwise. Few research the values, keep the same plans after continuances, and bring sufficient cash to bid the approximate value. Barrett v. Commonwealth Federal Savings Ass'n., 939 F.2d 20 (3rd Cir. 1991) said that the fact that foreclosure sales bring less than negotiated sales justifies tolerating a low price in foreclosure sales. The proper inference

from that fact is that foreclosure sales should be viewed with suspicion.

It is argued that there is no statutory authority for the 70% guidelines of Durrett v. Washington National Insurance, supra (Walter, p. 18,20). Neither is there any statutory authority for a presumption, even rebuttable, that the high bid at a foreclosure sale is reasonably equivalent value. The statute specifically states that the trustee has the power to avoid "any transfer" if reasonably equivalent value was not received and other requirements are present.

In United States v. Provident Trust Co., 291 U.S. 272, 284-86 (1934), in determining the value of a remainder to a charity subject to a life estate for lawful issue of a woman who after surgery was incapable of bearing a child, this court cited Wigmore, Ev. 2d. Ed. that the

basis for irrebuttable presumptions is avoidance of injury more important than the truth of a matter and said:

> ". . . we well may assume that Congress could not have meant to leave its aim [encouragement of charitable bequests] to be diverted by a purely arbitrary presumption, which whether applicable or not to sustain another or different policy, would deny the truth and subvert the policy of this particular legislation."

and that a bidder for the interest left to charity would consider the possibility of child bearing as destitute of reason.

31A C.J.S. 212, Section 117 Evidence states:

> "Presumptions of law may be created by statute if there is some justification of public policy, or a rational connection between the fact provided and the fact presumed."

In Heiner v. Donnan, 285 U.S. 312, 329 (1931) this court held that, although Congress could tax transfers within two years of death, it could not enact a conclusive presumption that transfers

within two years of death are in contemplation of death.

Certainly a court should not create a presumption unless the rational connection with the proven bid exists. Here, the rational presumption is that foreclosures do not establish value.

Having guidelines and logical presumptions may encourage bidding of a reasonably equivalent value. Appropriate rules include: (1) there is no presumption of reasonably equivalent value in a foreclosure sale of a single family dwelling for less than 80% of market value, (2) such a sale for less than 70% is (or is presumed to be) for less than reasonably equivalent value and (3) a sale for less than 85% of value and lack of requested notices of continuance or other circumstances referred to in F hereof make the sale voidable.

C. IF THE PURPOSE OF 11 U.S.C. 548 IS TO BE CONSIDERED, INCLUSION OF FORECLOSURES IS CONSISTENT AND EXCLUSION OF FORECLOSURES INCONSISTENT WITH THAT PURPOSE.

As shown in B.1 and B.2 above, the language of the statute under certain circumstances "any transfer" not for reasonably equivalent value may be avoided includes foreclosures without considering the purpose of the statute. However, Respondents argue the purpose. A purpose of 11 U.S.C. 548 is to bring property into the estate so that it may be distributed equitably to the creditors. Also avoiding a transfer of exempt property gives the debtor a fresh start (See J below). Those purposes are served by avoiding sales for less than reasonably equivalent value.

Since bids on foreclosure sales are generally low (B.4 above) application of 11 U.S.C. 548(a)(2) will not significantly discourage bidders.

Even under state law, emphasis on intent has changed to objectivity (see excerpts from Frank Kennedy, Appendix H hereto).

D. UNOPPOSED; NOT REARGUED HEREIN.

E. FORECLOSURE IS A TRANSFER.

In the matter under review, the Ninth Circuit did not discuss whether a foreclosure is a transfer. Respondents' do not state that this is a question to be reviewed. As said in B.2 above, some argue that by 11 U.S.C. 548(a)(2) Congress did not intend the bankruptcy trustee to have any right to avoid other than the right under state fraudulent conveyance laws. Do they mean there was no transfer?

From 1/1/1940 to 1/1/1987, the UFCA, and Cal. Civil Code Section 3439.04 provided that "any conveyance made" without fair consideration, while insol-

vent, is fraudulent as to creditors (Appendices C and D). Neither California law before 1987 nor the UFCA expressly include voluntary transfers. By contrast, 11 U.S.C. 548(a)(2) refers to "any transfer" of an interest of debtor in property (not limited to "transfers made") (and, after 1984 specifically refers to "involuntary"), if debtor receives less than reasonably equivalent value; 11 U.S.C. 101 states that "involuntary" transfers are included (and after 1984, specifically "foreclosure of debtor's equity of redemption"). Durrett v. Washington Nat. Ins. Co., supra, at 204 quoted from 1 Collier on Bankruptcy, Section 130 at 130.28 (2)(3) (14th Ed. 1967) that transfer in Bankruptcy Act Section 67 "'. . . includes surrender of possession.'"

While Section 101 does not expressly state that parting with possession is a

transfer, it does expressly include debtor's "parting with property or with an interest in property"; the right of possession and the equity subject to a mortgage are interests in property.

In re Winshall Settlor's Trust, 758 F.2d 1136 (6th Cir. 1985) cited on the issue of reasonably equivalent value (RTC p.7; Osborne p. 13, 16, 23, 24; Fed. Home pp. 4, 14; Council of States pp. 3-7; Walter p. 20) held that a foreclosure is no transfer. Even the 9th Circuit now disagrees with Winshall on that point, In re Ehring, 900 F.2d 184 (9th Cir. 1990), because of the BAFJA amendments to Sections 101 and 548. Even prior to BAFJA, to say that the loss of title and the right to possession was no transfer, defied the statute.

This court held that whether a transaction is a transfer under the Bankruptcy Code is decided by federal

law, Barnhill, supra (as was true of transfers under the Bankruptcy Act, McKenzie v. Irving Trusts, supra).

F. THE FORECLOSURE SALE SHOULD BE AVOIDED UNDER THE EXCEPTION RECOGNIZED IN THE BAP MADRID DECISION.

Respondents argue that federal bankruptcy law should be the same as state law on mortgage foreclosures (Osborne p. 17, 20). As said in Central Bank of California v. Bell, 5 C.2d 324, 328 (1936) (Osborne p. 7, 13, 17) even under state law, "inadequacy of compensation is not sufficient ground for setting aside a trustee's sale legally conducted, in the absence of some elements of fraud, unfairness or . . .". To complete the partial quote from Graffam v. Burgess, 117 U.S. 180 (1885) (Am. Council, pp. 11, 13) the nonbankruptcy rule is "inadequacy is so great as to shock the conscience or unless there be additional circumstances

against its fairness". Madrid, supra (BAP) stated a similar rule.

In this case, the Complaint alleged (BFP Brief, pp. 12-13) and the declarations opposing the summary judgment proved (BFP Brief p. 17-18, 20-21), that less than two-thirds of value was bid, requested and promised notice of the continued sale date was not given (J.A. p. 58-59), Imperial concealed its moving ahead to foreclose (J.A. 53-55), the junior lien holder had advanced $31,276.54 (J. A. p. 335) to reinstate a prior default (J. A. p. 57) and told Imperial that he would reinstate but would delay awaiting determination of title (J. A. 334). The foregoing in addition to characteristically low prices on foreclosures (p. 30 herein) constitute unfairness under 11 U.S.C. 548(a)(2).

Gottlieb v. McArdle, supra, at 1526, avoided a foreclosure saying proof of

unfairness was not required under federal law and failure to notify of a continued date was unfairness under state law.

G. UPON AVOIDING A SALE UNDER 11 U.S.C. 548, THE COURT MAY GRANT OTHER RELIEF THAN RESTORATION OF TITLE; BFP'S CLAIM IS NOT MOOT.

It is contended that the proceeding is moot (Osborne, p. 4, f.n. 2). The basis of mootness is an event which

> ". . . renders it impossible for this court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever . . . "

Matter of Combined Metals Reduction Co., 557 F.2d 179, 187 (9th Cir. 1977). Respondents do not dispute that other relief is available (BFP's Brief, p. 48).

In Armster v. United States District Court, 806 F.2d 1347 (9th Cir. 1986). At page 1354 the Court said:

> "Courts of Appeal dismiss cases having become moot between the time of the ruling below and the issuance of an appellant decision because the requirement that Article III of the Court decide only 'cases or controversy.'" (Emphasis added) p. 1354.

Here, the sale occurred before the Bankruptcy Court ruled on the motion to dismiss the complaint (J. A. p. 351). The resale occurred only six days before the hearing on the Motion to Dismiss. Perhaps Respondents concealed it out of fear that BFP would amend to seek recovery of the resale proceeds.

There is no requirement that plaintiff pray for value. Although not discussing pleadings, In re International Ski Service, Inc., 119 B.R. 654, 656 (Bkrtcy. W.D. Wis. 1991) quoted a text to the effect that the option of recovery of value of the property is "apparently now given to the court" rather than the trustee as it was under former Section 60 of the Bankruptcy Act. It said that, where property is unrecoverable, the courts allow recovery of value (p. 658).

H. UNOPPOSED; NOT REARGUED HERE.

I. THE REMOVAL BY THE FORECLOSURE OF THE LIEN OF THE JUNIOR DEED OF TRUST IS NO BENEFIT TO PETITIONER AND IS NOT CONSIDERED AS VALUE RECEIVED.

The elimination of the second trust deed was no benefit to BFP; BFP lost the property. In re Davis, 148 B.R. 165, 174-175 (Bkrtcy. E.D. N.Y. 1992) held that such is not counted as consideration received.

J. THE PROPERTY IN THIS CASE IS NOT EXEMPT FROM CLAIMS OF CREDITORS; TRANSFERS OF EXEMPT PROPERTY ARE AVOIDABLE UNDER 11 U.S.C. 548.

It is argued that transfers of exempt property cannot be avoided. (Walter, p. 13-17 and 25). The argument has no merit for several reasons.

First, 11 U.S.C. 522 provides that an "individual debtor may" exempt certain property. A partnership is not entitled to exemptions. California exemptions are available only to a "natural person",

Section 703.020 Cal. Code of Civil Procedure; also, a homestead is the "personal dwelling" in which the debtor or his spouse reside; Section 704.410(c) Cal. Code of Civil Procedure. In Lockwood v. Exchange Bank, 190 U.S. 294 (1903), cited as showing a transfer of exempt property cannot be avoided, an individual, not a partnership, owned the property. Also Section 67 of the Bankruptcy Act, specifically provided that property fraudulently conveyed if "not exempt . . . by the law of his domicile be and remains part of the assets and estate of the bankrupt." Lockwood pointed out that, under the Act, exempt property did not pass to the representative in bankruptcy (190 U.S. at 299, 300). Present law is that "an individual debtor may exempt from property of the estate, . . ." (11 U.S.C. 522(b)) (Appendix B).

Secondly, Section 522(f) provides

that a debtor may avoid an involuntary transfer voidable under 548 to the extent debtor could have exempted the property under 522(g)(1) and proceeds of exempt property recovered may be exempted under 522(h).

A Chapter 7 debtor can avoid a tax sale if the property could be homesteaded and the trustee does not avoid it In re McKeever, 132 B.R. 996, 1004 (Bkrtcy. N.D.L. 1991). Homesteaded property can be brought into a Chapter 13 estate. In re Davis, supra at 176. Thus, a clear purpose of the Code 11 U.S.C. 522 is to bring even exempt property into the estate for a debtor's benefit.

K. EVEN IF THE BANKRUPTCY COURT WERE BOUND BY MADRID, THIS HONORABLE COURT IS NOT.

A Respondent contends that the Bankruptcy Court was bound to follow Madrid (Osborne p.21). See BFP's analysis at page 26 hereinabove.

In Bank of Maui v. Estate Analysis, Inc., 904 F.2d 470 (4th Cir. 1990) (Osborne p. 21) it was held that the District Court was not bound by BAP decisions (see also Appendix G hereto).

This Court is not bound by stare decisis of a lower court decision. Madrid should be disapproved.

CONCLUSION

The judgments should be reversed and the case remanded with directions to deny the motions. Also, it would be appropriate to establish guidelines suggested in B.5 above.

Dated: September 25, 1993.

RESPECTFULLY SUBMITTED,

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APPENDICES

APPENDIX A

PERTINENT PARTS OF

FORMER BANKRUPTCY ACT (PRIOR TO 1978)

Section 1 of the Act, 11 U.S.C. Section 1, provided in pertinent part:

The words and phrases used in this title and in proceedings pursuant hereto shall, unless the same be inconsistent with the context, be construed as follows:

* * *

(30) "Transfer" shall include the sale and every other and different mode, direct or indirect, of disposing of or of parting with property or with an interest therein or with the possession thereof or of fixing a lien upon property or upon an interest therein, absolutely or conditionally, voluntarily or involuntarily, by or without judicial proceedings, as a conveyance, sale, assignment, payment, pledge, mortgage, lien, encumbrance,

gift, security, or otherwise; the retention of a security title to property delivered to a debtor shall be deemed a transfer suffered by such debtor;

* * *

Section 67d of the Act, 11 U.S.C. 107(d) provided in pertinent part, with [__] to show changes in 11 U.S.C. 107(d):

(1) For the purposes of, and exclusively applicable to, this subdivision d:

* * *

(e) consideration given for the property or obligation of a debtor is "fair" (1) when, in good faith, in exchange and as a fair equivalent therefor, property is transferred

* * *

(2) Every transfer made and every obligation incurred by a debtor within one year prior to the filing of a petition initiating a proceeding under this title by or against him is fraudulent (a)

as to creditors existing at the time of such transfer or obligation, if made or incurred without fair consideration by a debtor who is or will be thereby rendered insolvent, without regard to his actual intent;

* * *

(6) A transfer made or an obligation incurred by a debtor adjudged a bankrupt under this [title] Act, which is fraudulent under this subdivision against creditors of such debtor having claims provable under this title, shall be null and void against the trustee, except as to a bona fide purchaser, lienor, or obligee for a present fair equivalent value.

* * *

APPENDIX B

PERTINENT PART OF

BANKRUPTCY CODE (1978) as amended

11 U.S.C. 522

* * *

Exemptions

(a) In this section --

1) "dependent" includes spouse, whether or not actually dependent; and

2) "value" means fair market value as of the date of the filing of the petition or, with respect to property that becomes property o the estate after such date, as of the date such property becomes property of the estate.

(b) Notwithstanding section 541 of this title, an individual debtor may exempt from property of the estate the property listed in either paragraph (1) or, in the alternative, paragraph (2) of this subsection. In joint cases filed under

section 302 of this title and individual cases filed under section 301 or 303 of this title by or against debtors who are husband and wife, and whose estates are ordered to be jointly administered under Rule 1015(b) of the Bankruptcy Rules, one debtor may not elect to exempt property listed in paragraph (1) and the other debtor elect to exempt property listed in paragraph (2) of this subsection. If the parties cannot agree on the alternative to be elected, they shall be deemed to elect paragraph (1), where such election is permitted under the law of the jurisdiction where the case is filed. Such property is --

(1) property that is specified under subsection (d) of this section, unless the State law that is applicable to the debtor under paragraph (2)(A) of this subsection specifically does not so authorize; or, in the alternative,

(2)(A) any property that is exempt under Federal law, other than subsection (d) of this section, or State or local law that is applicable on the date of the filing of the petition at the place in which the debtor's domicile has been located for the 180 days immediately preceding the date of the filing of the petition, or for a longer portion of such 180-day period than in any other place; and

(B) Any interest in property in which the debtor had, immediately before the commencement of the case, an interest as a tenant by the entirety or joint tenant to the extent that such interest as a tenant by the entirety or joint tenant is exempt from process under applicable nonbankruptcy law.

(c) Unless the case is dismissed, property exempted under this section is not liable during or after the case of

any debt of the debtor that arose, or that is determined under section 502 of this title as if such debt had arisen, before the commencement of the case, except --

(1) a debt of a kind specified in section 523(a)(1) or 523 (a)(5) of this title;

(2) a debt secured by a lien that is

(A)(i) not avoided under subsection (f) or (g) of this section or under section 544, 545, 548, 549, or 724(a) of this title; and

(ii) not void under section 506(d) of this title; or

(B) a tax lien, notice of which is properly filed; or

(3) a debt of a kind specified in section 523(a)(4) or 523(a)(6) of this title owed by an institution-affiliated party of an insured depository institution to a Federal depository institutions

regulatory agency acting in its capacity as conservator, receiver, or liquidating agent for such institution.

(d) The following property may be exempted under subsection (b)(1) of this section:

(1) The debtor's aggregate interest, not to exceed $7,500 in value, in real property or personal property that the debtor or a dependent of the debtor uses as a residence, in a cooperative that owns property that the debtor or a dependent of the debtor uses as a residence, or in a burial plot for the debtor or a dependent of the debtor.

(2) The debtor's interest, not to exceed $1,200 in value, in one motor vehicle.

(3) The debtor's interest, not to exceed $200 in value in any particular item or $4,000 in aggregate value, in household furnishings, household goods,

wearing apparel, appliances, books, animals, crops, or musical instruments, that are held primarily for the personal, family, or household use of the debtor or a dependent of the debtor.

* * *

(g) Notwithstanding sections 550 and 551 of this title, the debtor may exempt under subsection (b) of this section property that the trustee recovers under section 510(c)(2), 542, 543, 550, 551, or 553 of this title, to the extent that the debtor could have exempted such property under subsection (b) of this section is such property had not been transferred, if --

(1)(A) such transfer was not a voluntary transfer of such property by the debtor; and

(B) the debtor did not conceal such property; or

(2) the debtor could have avoided

such transfer under subsection (f)(2) of this section.

(h) The debtor may avoid a transfer of property of the debtor or recover a setoff to the extent that the debtor could have exempted such property under subsection (g)(1) of this section.

(1) such transfer is avoidable by the trustee under sections 544, 545, 547, 548, 54, or 724(a) of this title or recoverable by the trustee under Section 554 of this title; and

(2) the trustee does not attempt to avoid such transfer.

(i)(1) If the debtor avoids a transfer or recovers a setoff under subsection (f) or (h) of this section, the debtor may recover in the manner prescribed by, and subject to the limitations of, section 550 of this title, the same as if the trustee had avoided such transfer, and may exempt any property so recovered

under subsection (b) of this section.

(2) Notwithstanding section 551 of this title, a transfer avoided under section 544, 545, 547, 548, 549, or 724(a) of this title, under subsection (f) or (h) of this section, or property recovered under section 553 of this title, may be preserved for the benefit of the debtor to the extent that the debtor may exempt such property under subsection (g) of this section or paragraph (1) of this subsection.

(j) Notwithstanding subsections (g) and (i) of this section, the debtor may exempt a particular kind of property under subsections (h) and (e) of this section only to the extent that the debtor has exempted less property in value of such kind than that to which the debtor is entitled under subsection (b) of this section.

(k) Property that the debtor exempts

under this section is not liable fore payment of any administrative expense except --

(1) the aliquot share of the costs and expenses of avoiding a transfer of property that the debtor exempts under subsection (g) of this section, or of recovery of such property, that is attributable to the value of the portion of such property exempted in relation to the value of the property recovered; and

(2) any costs and expenses of avoiding a transfer under subsection (f) or (h) of this section, or of recovery of property under subsection (i)(1) of this section, that the debtor has not paid.

(l) The debtor shall file a list of property that the debtor claims as exempt under subsection (b) of this section. If the debtor does not file such a list, a dependent of the debtor may file such a list, or may claim property as exempt

from property of the estate on behalf of the debtor. Unless a party in interest objects, the property claimed as exempt on such list is exempt.

(m) Subject to the limitation in subsection (b), this section shall apply separately with respect to each debtor in a joint case.

11 U.S.C. 542

Sec. 542. Turnover of property to the estate.

(a) Except as provided in subsection (c) or (d) of this section, an entity, other than a custodian, in possession, custody, or control, during the case, of property that the trustee may use, sell, or lease under section 363 of this title [11 U.S.C. Sec. 363], or that the debtor may exempt under section 522 of this title [11 U.S.C. Sec. 522], shall deliver to the trustee, and account for, such property or the value of such property,

unless such property is of inconsequential value or benefit to the estate.

(b) Except as provided in subsection (c) or (d) of this section, an entity that owes a debt that is property of the estate and that is matured, payable on demand, or payable on order, shall pay such debt to, or on the order of the trustee, except to the extent that such debt may be offset under section 553 of this title [11 U.S.C. Sec. 553] against a claim against the debtor.

(c) Except as provided in section 362(a)(7) of this title [11 U.S.C. Sec. 362(a)(7), an entity that has neither actual notice nor actual knowledge of the commencement of the case concerning the debtor may transfer property of the estate, or pay a debt owing to the debtor, in good faith and other than in the manner specified in subsection (d) of this section, to an entity other than the

trustee, with the same effect as to the entity making such transfer or payment as if the case under this title [11 U.S.C. Secs. 101, et seq.] concerning the debtor had not been commenced.

11 U.S.C. 544

Sec. 544. Trustee as lien creditor and as successor to certain creditors and purchasers.

* * *

(b) The trustee may avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law by a creditor holding an unsecured claim that is allowable under section 502 of this title or that is not allowable only under section 502(e) of this title.

11 U.S.C. 548

Sec. 548. Fraudulent transfers and obligations

[See p. 69-70, Appendix to Amended Petition for Writ of Certiorari]

11 U.S.C. 550

550. Liability of transferee of avoided transfer.

(a) Except as otherwise provided in this section, to the extent that a transfer is avoided under section 544, 545, 547, 548, 549, 553(b) or 724(a) of this title, the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from --

(1) the initial transferee of such transfer or the entity for whose benefit such transfer was made; or

(2) any immediate or mediate transferee of such initial transferee.

(b) The trustee may not recover under section (a)(2) of this section from --

(1) a transferee that takes for value, including satisfaction or securing of a present or antecedent debt, in good faith, and without knowledge of the

voidability of the transfer avoided; or

(2) any immediate or mediate good faith transferee of such transferee.

(c) The trustee is entitled to only a single satisfaction under subsection (a) of this section.

(d)(1) A good faith transferee from whom the trustee may recover under subsection (a) of this section has a lien on the property recovered to secure the lesser of --

(A) the costs, to such transferee, or any improvement made less the amount of any profit realized or accruing to such transferee from such property; and

(B) any increase in value as a result of such improvement, of the property transferred.

(2) In this subsection, "improvement" includes --

(A) physical additions or

changes to the property transferred;

(B) repairs to such property;

(C) payment of any tax on such property;

(D) payment of any debt secured by a lien on such property that is superior or equal to the rights of trustee;

(E) preservation of such property.

(e) An action or proceeding under this section may not be commenced after the earlier of --

(1) One year after the avoidance of the transfer on account of which recovery under this section is sought; or

(2) the time the case is closed or dismissed.

APPENDIX C

UNIFORM FRAUDULENT CONVEYANCE ACT

An Act concerning fraudulent conveyances and to make uniform the law relating thereto.

1918 ACT

* * *

Sec. 1. Definition of Terms.

In this act "Assets" of a debtor means property not exempt from liability for his debts. To the extent that any property is liable for any debts of the debtor, such property shall be included in his assets.

"Conveyance" includes every payment of money, assignment, release, transfer, lease, mortgage or pledge of tangible or intangible property, and also the creation of any lien or incumbrance.

* * *

Sec. 4. Conveyances by Insolvent.

Every conveyance made and every

obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation is incurred without a fair consideration.

* * *

APPENDIX D

PERTINENT PARTS OF

CALIFORNIA UNIFORM FRAUDULENT

CONVEYANCE ACT (CAL. CIV. CODE)

(adopted 1939, repealed effective 1-1-87)

Sec. 3439.01. Definitions.

In this act "Assets" of a debtor means property not exempt from liability for his debts. To the extent that any property is liable for any debts of the debtor, such property shall be included in his assets.

"Conveyance" includes every payment of money, assignment, release, transfer, lease, mortgage or pledge of tangible or intangible property, and also the creation of any lien or incumbrance.

* * *

.Sec. 3939.03. Fair consideration.

Fair consideration is given for property, or obligation:

(a) When in exchange for such property,

or obligation, as a fair equivalent therefor, and in good faith, property is conveyed or an antecedent debt is satisfied, or

(b) When such property, or obligation is received in good faith to secure a present advance or antecedent debt in amount not disproportionately small as compared with the value of the property, or obligation obtained.

Sec. 3439.04. Conveyances by insolvent.

Every conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation is incurred without a fair consideration.

APPENDIX E

UNIFORM FRAUDULENT TRANSFER ACT

Section 1. Definitions.

* * *

(12) "Transfer" means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset, and includes payment of money, release, lease, and creation of a lien or other incumbrance.

* * *

Section 3. Value.

(a) Value is given for a transfer or an obligation if, in exchange for the transfer or obligation, property is transferred or an antecedent debt is secured or satisfied, but value does not include an unperformed promise made otherwise than in the ordinary course of the promiser's business to furnish support to the debtor or another person.

(b) For the purposes of Sections 4(a)(2) and 5, a person gives a reasonably equivalent value if the person acquires an interest of the debtor in an asset pursuant to a regularly conducted, noncollusive foreclosure sale or execution of a power of sale for the acquisition or disposition of the interest of the debtor upon default under a mortgage, deed of trust, or security agreement.

(c) A transfer is made for present value if the exchange between the debtor and the transferee is intended by them to be contemporaneous and is in fact substantially contemporaneous.

* * *

Section 5. Transfers Fraudulent as to Present Creditors.

(a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the

transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.

(b) A transfer made by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made if the transfer was made to an insider for an antecedent debt, the debtor was insolvent at that time, and the insider had reasonable cause to believe that the debtor was insolvent.

APPENDIX F

PERTINENT PARTS OF

CALIFORNIA UNIFORM TRANSFER ACT

IN THE CALIFORNIA CIVIL CODE

(EFFECTIVE 1/1/87 TO PRESENT)

* * *

Sec. 3439. Citation of chapter. This chapter may be cited as the Uniform Fraudulent Transfer Act.

* * *

Sec. 3439.01. Definitions. As used in this chapter the following definitions are applicable:

* * *

(i) "Transfer" means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset, and includes payment of money, release, lease, and creation of a lien or other encumbrance.

* * *

Sec. 3439.03. Value for transfer or obligation. Value is given for a transfer or an obligation if, in exchange for the transfer or obliged property is transferred or an antecedent is secured or satisfied, but value does not include an unperformed promise made otherwise than in the ordinary course of the promiser's business to furnish support to the debtor or another person.

* * *

Sec. 3439.04. Transfer with intent to defraud; a transfer not given in exchange for value. A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation as follows:

(a) With actual intent to hinder, delay, or defraud any creditor of the

debtor.

(b) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:

(1) Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or

(2) Intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due.

* * *

Sec. 3439.05. Transfer resulting in debtor's insolvency. A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably

equivalent value in exchange for the transfer or obligation and the debtor became insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.

***

Sec. 3439.07. Creditor's remedies.

(a) In an action for relief against a transfer or obligation under this chapter, a creditor, subject to the limitations in Section 3439.08, may obtain:

1. Avoidance of the transfer or obligation to the extent necessary to satisfy the creditor's claim.

2. An attachment or other provisional remedy against the asset transferred or its proceeds in accordance with the procedures described in Title 6.5 (commencing with Section 418.010) of Part 2 of the Code of Civil Procedure.

3. Subject to applicable principles of equity and in accordance with applica-

ble rules of civil procedure, the following:

* * *

(C) Any other relief the circumstances may require.

* * *

Sec. 3439.08. When transfer not voidable; Amount of judgment; Remedies of good faith transferee.

(a) A transfer or an obligation is not voidable under subdivision (a) of Section 3439.04, against a person who took in good faith and for a reasonably equivalent value or against any subsequent transferee or obligee.

(b) Except as otherwise provided in this section, to the extent a transfer is voidable in an action by a creditor under paragraph (1) of subdivision (a) of Section 3439.07, the creditor may recover judgment for the value of the asset transferred, as adjusted under subdivi-

sion (c), or the amount necessary to satisfy the creditor's claim, whichever is less.

* * *

APPENDIX G

Excerpts from Reply Brief of Petitioner in District Court, pages 9-13:

* * *

In re Windmill Farm, Inc., 70 B.R. 618, 622 (9th Cir. BAP 1987) involved the right of a debtor to assume a lease claimed to have been terminated under state law. There the court said:

> "The Bankruptcy Appellate Panel which was established under the authority of 28 U.S.C., Section 158(b) is also an intermediate appellate body."

* * *

> One of the reasons for establishing the BAP was to provide a uniform and consistent body of bankruptcy law throughout that entire Circuit. In order to achieve this desired uniformity, the decisions of the Bankruptcy Appellate Panel must be binding on all of the bankruptcy courts from which review may be sought, i.e., each district in the Ninth Circuit . . ."

Windmill Farms only holds that the bankruptcy courts, not District Courts, must follow the BAP.

Since Appellees do not discuss the basis or breadth of stare decisis, we turn to 3 Moore's Manual, Federal Practice and Procedure, pages 30-5, Section 30.02(1), saying:

> "The rule, as developed in the English law, is that a decision on an issue of law embodied in a final judgment is binding on the court that decided it and such other courts as owe obedience to its decision, in all future cases"
>
> The American law has never embraced this strict construction of the doctrine of the stare decisis. The Supreme Court very early asserted its prerogative to change its mind,[1] and has done so many times, sometimes with respect to is-sues settled by repeated decisions over the course of many years.[2] Nor have the lower courts shrunk from change when they have found it to be appropriate.[3] Nevertheless, the concept of controlling precedent plays an important role in American litigation, for while the power exists in the court that decides a case to overrule it, a court has no obligation to reconsider settled points . . ."

In footnote 1 Moore cites Helvering v. Hallock, 309 U.S. 106, 121, 60 S.Ct. 444, 84 L.Ed. 604 (1940).

Moore cites, in support of the rule that the Supreme Court can change its mind, Schaffer v. Heitner, 544 U.S. 186, 97 S.Ct. 2569, 53 L.Ed.2d 683 (1977). In 53 1.Ed. at page 703 in footnote 39, the court said "to the extent that prior decisions are consistent with this standard, they are overruled."

In Moore page 30-6, Moore said:

> "Stare decisis applies not only to successive decisions in the same court, but also to decisions in courts owing obedience to that court. In this context, the principle of conformity is more rigid. All other American courts, state and federal, owe obedience to the decisions of the Supreme Court of the United States.
>
> ". . .on questions of federal law, and a judgment of the Supreme Court provides the rule to be followed in all such courts until the Supreme Court sees fit to reexamine it.
>
> In like fashion, the district courts in a circuit owe obedience to a decision of the court of appeals in that circuit and must follow it until the court of appeals sees fit to overrule it."

Note how carefully Moore states the

rule with respect to lower courts as courts which owe obedience to the higher court who made the decision. In this case, the appeal from the Bankruptcy Court could have been to the Bankruptcy Appellate Panel. The Bankruptcy Court below felt it owed obedience to BAP. Were the appeal in this case before the BAP, it could consider whether or not to overrule its grounds of decision in Madrid, 21 B.R. 424 (that the foreclosure sale establishes the reasonably equivalent value of the property). But there is no appeal from this court to the BAP.

The BAP Madrid decision is contrary to the law. Aside from that, the decision is not binding as stare decisis because:

First, the Ninth Circuit Court of Appeals has not decided the issue confronting this court (does the foreclosure sale establish the reasonably equivalent

value?). The Ninth Circuit had a chance to in Madrid, 725 F.2d 1197. However, it did not consider the ground of the BAP decision in Madrid, and affirmed the decision on another ground, that is, that there was no transfer, a matter Congress has clearly taken care of. Ninth Circuit's affirming the decision on entirely different grounds (no transfer) suggests the probability that the Ninth Circuit Court of Appeal doubted the wisdom and propriety of interpreting the law as the BAP decision did (doubted that the transfer by foreclosure establishes the reasonably equivalent value).

Second, this court is not a bankruptcy court and is not bound to the BAP opinion on principles of stare decisis. This could should decide the issue based on independent thinking considering the BAP Madrid decision only to the extent it may be persuasive.

Third, the 1984 change to 11 U.S.C. Section 101(48), now 101(50), changed the result in the Madrid Ninth Circuit decision and was obviously intended to undo the result of the BAP Madrid decision as shown in the discussion below.

For the third and part of the first reason above, we feel that the Lindsay decision did not err in ignoring the alleged stare decisis effect of the BAP decision in Madrid. Even if the bankruptcy court in the Lindsay case (appealable to BAP), erred in ignoring the stare decisis effect on bankruptcy courts of the BAP's decision in Madrid, that does not make its opinion on the meaning of 11 U.S.C. 548 any less logical. It is a very persuasive brief for the appellants in this case. The Verna decision, which followed the BAP decision, itself considered the BAP decision in Madrid to be only persuasive and not binding on it.

To that extent Verna was correct, but then Verna followed the illogical legal fiction that the bid at the foreclosure sale establishes the reasonably equivalent value for the transfer.

APPENDIX H

Excerpts from Involuntary Fraudulent Transfers by Frank R. Kennedy, 9 Cardoza Law Review 531:

[p. 532]

INTRODUCTION

* * *

It is the thesis of this Article that Durrett was not wrong in holding that a foreclosure sale is a transfer under the bankruptcy laws and that the "Durrett doctrine" is not so novel as Judge Clark's dissent and its progeny suggest.[6]

* * *

[p. 534]

If an economic system employing credit is to function efficiently, creditors must be able to enforce obligations assumed by or imposed on their debtors. The law of fraudulent and preferential transfers consists of rules that have developed to enable creditors to enforce

the duty of a debtor to be fair to all creditors. If a debtor, who is or may be unable to satisfy all of his or her creditors, makes a disposition that will be unduly prejudicial to one or more of his creditors, the injured creditor is enabled to avoid the disposition to permit the collection of his or her claim. If the debtor's disposition constitutes no more than a preference---gives a creditor-transferee no more than full payment or satisfaction---other creditors cannot avoid the transfer unless the avoidance benefits all creditors injured by the transfer. A rule that would allow one creditor to obtain a preference by going to court to take away another's preference would be difficult to justify. For that reason, the avoidance of preferences has generally been a creditor's remedy available only when invoked under a

bankruptcy law that provides for equitable distribution of a debtor's estate.

When a debtor in financial stringency, present or foreseeable, makes a disposition that is not merely preferential but is intentionally fraudulent or results in a transfer that is not matched by any equivalent consideration received by the debtor, an injured creditor acting alone is allowed to avoid the prejudicial transfer. Whenever any creditor has a right to avoid a debtor's transfer under nonbankruptcy law, however, the bankruptcy laws have uniformly authorized avoidance on behalf of the injured creditor group by their representative when the debtor's estate is administered under those laws.

In their initial formulation, the rules applicable to fraudulent and preferential transfers appeared to require a mental state on the part of the transferor,

transferee, or both before a transfer could be avoided. As the discussion that follows demonstrates, an observable tendency [p. 535] of the laws governing both kinds of transfers has been to de-emphasize or eliminate the role of the participants' mental states and to make the effect of the transfer and the timeliness of the attack the critical elements of the avoidance action. The Durrett doctrine is thus wholly consonant with the course of development of creditors' remedies against injurious transfers of their debtors' assets. The participants' mental states can hardly have any relevance in considering the efficiency and appropriateness of the remedy from the viewpoint of the creditors intended to be protected by the rules governing fraudulent and preferential transfers. The transferee's mental state and the timeliness of the avoidance

have a legitimate bearing on the fairness of the avoidance to the transferee, but the diminution of the significance of the transferor's intentions is a reflection of a logical and reasoned approach to the enhancement of the role of creditors' remedies against fraudulent and preferential transfers.

* * *

[p.537]

C. The Objectification of Fraudulent Intent Under the Statute of 13 Elizabeth

* * *

While every statute derived from the Statute of 13 Elizabeth reaches transfers made "with intent to hinder, delay, or defraud creditors," legislative codification of the law of fraudulent transfers has generally added provisions particularizing circumstances that warrant [p. 538] avoidance of certain transfers

without regard to the parties' intent.[26] From the earliest cases the courts applying the Statute of 13 Elizabeth have recognized that fraudulent intent is rarely susceptible of direct proof[27] and that the statute's reach should not be limited to particular forms of transfers.[28]

Contrary to the suggestion that constructively fraudulent transfers are the product of the twentieth-century imaginations of the UFCA draftsmen, there is considerable case law in England and America going back over 200 years avoiding certain transfers as fraudulent without regard to the evidence of the transferor's actual intent. Thus, in Townsend v. Windham,[29] decided in 1750, Lord Hardwicke declared that "[a] man, actually indebted, and conveying voluntarily, always means to be in fraud of creditors."[30] This was the English rule

for more than 100 years,[31] and it has been followed in a number of American jurisdictions where the UFCA has not established a less drastic rule.[32] The leading American case was Reade v. [p. 539] Livingston,[33] where Chancellor Kent expounded its rule in the following terms:

> "[I]f the party be indebted at the time of the voluntary settlement, it is presumed to be fraudulent in respect to such debts, and no circumstance will permit those debts to be affected by the settlement, or repel the legal presumption of fraud. The presumption of law, in this case, does not depend upon the amount of the debts, or the extent of the property in settlement, or the circumstances of the party."[34]

D. The Uniform Fraudulent Conveyance Act

So harsh a doctrine is hardly congenial in a credit economy, where a member of society is likely to be entirely debt free. Indeed, many charitable institutions depend on the largess of private

citizens, and intrafamily giving on certain occasions and at certain seasons is a deeply entrenched practice. The legislature of New York reacted against the harsh rule of Reade v. Livingston by attempting to impose a rigid requirement that the question of fraudulent intent should be "deemed a question of fact and not of law."[35] That legislative effort was foredoomed to failure,[36] but the legislative approach taken in the UTCA proved more successful.

* * *

"Conveyance" was defined to include every transfer of property [p. 540] "and also the creation of any lien or incumbrance."[39] Nothing in the language of the UFCA or the comments of the draftsmen that accompanied its promulgation indicated an intent to preclude application of its avoiding provisions to an involuntary transfer. The decisions covered

involuntary transfers,[40]

Footnote 40 reads as follows:

> See. e.g., Lefkowitz v. Finkelstein Trading Corp., 14 F.Supp. 898, 899 (S.D.N.Y. 1936) ("A transfer effected on execution sale may be as fraudulent on creditors as a transfer made by the debtor's own volition, where the effect is to hinder, delay, and defraud creditors."); Catabene v. Wallner, 16 N.J. Super. 597, 601-02, 85 A.2d 300, 302 (App.Div. 1951) (mortgage foreclosure); Hearn 45 St. Corp. v. Jano, 283 N.Y. 139, 143-45, 27 N.E.2d 814, 817 (1940) (upholding application of the UFCA to a complaint alleging constructive fraud accomplished through judicial proceedings, including a foreclosure sale and appintment of a receiver of the judgment debtor's assets); Langan v. First Trust & Deposit Co., 277 A.D. 1090, 101 N.Y.S.2d 36 (1950), aff'd, 302 N.Y. 932, 100 N.E.2d 189 (1951) (mortgage foreclosure); Zakheim v. Dry Harbor Homes, Inc., 245 A.D. 769, 770, 281 N.Y.S. 153, 154 (1935) (foreclosure sale); cf. Shapiro v. Wilgus, 287 U.S. 348, 354-55 (1932) (transfer of individual debtor's assets to newly created corporation followed by equity receivership obtained by creditor and debtor held to be fraudulent transfer under both UFCA and Statute of 13 Elizabeth); Toner v. Nuss 234 F.Supp. 457, 461-62 (E.D. Pa. 1964) (pre-UFCA Pennsylvania law applied to avoid sheriff's sale as fraudulent in view of purpose of creditor's principal to defraud other creditors). But cf.

Merriam v. Wimpfheimer, 25 F.Supp. 405, 407 (S.D.N.Y. 1938) (denying relief to a creditor seeking recovery of stock sold on foreclosure of a pledge, in part on the ground that "[t]he laws of New York . . . require a voluntary act by the transferor to constitute a conveyance" and in part for the reason that the sale was for a fair consideration).

The court in Catabene, 16 N.J. Super. at 601, 85 A.2d at 302, answered the defendant's challenge to the right of the creditor or the trustee to attack a judgment as follows: "Even though it is a judgment of a legally organized judicial tribunal, proceeding within the scope of its allotted powers and possessing the requisite jurisdiction over the subject matter of the suit and the parties thereto, it may be collaterally attacked when the judgment is procured through the fraud of either of the parties or by the collusion of both for the purpose of defrauding a third person."

* * *

[p.541]

II. AVOIDANCE IN BANKRUPTCY

A. The Bankruptcy Act of 1898 and Its Antecedents

The original function of bankruptcy,[45] and one still frequently identified as

its principal role,[46] is to provide for and regulate equitable distribution of a debtor's estate. Avoidance of transfers under the Roman law has been viewed as an adjunct to the Roman system of collective execution.[47] Although English and American law have per- [p. 542] mitted the avoidance of certain transfers independently of any provision for a general distribution, it has not been conceived that any workable bankruptcy law would fail to include provisions for the avoidance of transfers of the debtor's property. Indeed, English bankruptcy legislation antedating the Statute of 13 Elizabeth authorized the recovery of fraudulently transferred property for application to the payment of the transferor's debts.[48] While the avoidance of preferences is not ordinarily available as a creditor's remedy in the absence of a provision for redistribution of the

debtor's estate to all creditors, the avoidance of fraudulent transfers has been recognized as no less indispensable than the avoidance of preferences in Anglo-American bankruptcy laws. Indeed, the first American Bankruptcy Act did not mention preferences although it made fraudulent conveyances voidable.[49] All subsequent bankruptcy acts enacted by Congress have authorized the avoidance of both preferential and fraudulent transfers.[50]

A fraudulent transfer has not only been voidable under all our bankruptcy legislation, but, until 1979, the making of such a transfer was also a ground for commencing an involuntary bankruptcy case against the transferor.[51] The trustee in bankruptcy has been author- [p. 543] ized under both the Bankruptcy Act of 1898 and the Bankruptcy Reform Act to seek avoidance of a fraudulent transfer under

either of two statutory provisions; one establishing a federal standard of voidability, [52] and the other incorporating by reference any non-bankruptcy law rendering a transfer voidable by a creditor of the estate.[53] Other sections of the Bankruptcy Act of 1898 authorized the [p. 544] trustee to avoid preferential transfers.[54] Congress has manifested a consistent purpose to give a broad meaning to its use of the word "transfer" in the several sections where it appears in the bankruptcy laws.[55] For years, the courts frustrated the congressional purpose to [p. 545] strike at secret transfers as subversive of bankruptcy policy,[56] but the Supreme Court early accorded sympathetic treatment to the congressional definition of "transfer." The classic statement of the definition was made by the Court in Pirie v. Chicago Title & Trust Co.; "The word is used in

its most comprehensive sense, and is intended to include every means and manner by which property can pass from the ownership and possession of another, and by which the result forbidden by the statute may be accomplished . . . ."[57]

In particular, the courts recognized that the term embraced an involuntary as well as a voluntary disposition.[58] When the Bankruptcy Act of 1898, in describing an act of bankruptcy, required a transfer to be effected by the debtor with a specific intent to prefer or defraud, the courts regarded the statute to be satisfied when a creditor obtained a lien or title by pursuing a judicial remedy while the debtor remained quiescent.[59]

[p. 546]

Liens created by judicial proceedings on the eve of bankruptcy have been viewed as a particularly offensive variety of transfer under both English and American

bankruptcy law.

* * *

When a judicial lien was enforced by a sale before the filing of a petition by or against the debtor, however, it was no longer vulnerable as such, but the resulting transfer to the purchaser was properly held subject to challenge under one of the avoidance sections directed at transfers.[61] When a New York court held that a garnishee execution on the eve of bankruptcy was not voidable as a preferential transfer since there was no voluntary action on the part of the debtor,[62] the Court of Appeals for the Second Circuit promptly repudiated the interpretation in the following terms: "The bankrupt's inaction from the time of levy of execution to the time of the sale indicates sufficiently his participation, so that he 'made the transfer.'[63]

[p. 547]

B. The Chandler Act

The Prefatory Note accompanying the UFCA recognized not only the desirability of national uniformity in the law of fraudulent transfers but also the desirability of compatibility with the provisions of the bankruptcy laws applicable to fraudulent transfers.[64] This view was dramatically reciprocated by the draftsman of the Chandler Act that overhauled the Bankruptcy Act in 1938.[65] At the same time, the definition of "transfer" was amended to make explicit the intention to include an involuntary transfer.[66] The narrower definition of "conveyance" in the UFCA was not incorporated into section 67d since the expanded definition of "transfer" was intended to apply in proceedings under section 67.[67]

Cases applying the fraudulent transfer provisions of the Chandler Act to involuntary transfers include Britt v. Damson,[68] [334 F.2d 896 (4th Cir. 1964) cert. den. 379 U.S. 966 (1965)] a decision by the Court of Appeals for the Ninth Circuit.[69] That court held that [p. 548] section 67d(2) of the Bankruptcy Act, the precursor of section 548(a)(2) of the Bankruptcy Code ("Code"), rendered an award by a divorce decree voidable as a fraudulent transfer to the extent that the bankruptcy husband did not receive fair consideration.[70]

In Wolf v. Aero Factors Corp., [71] a trustee in bankruptcy attacked an execution sale and a foreclosure sale of repossessed chattels by a mortgagee held within three months of the debtor's bankruptcy. Both sales were of the same chattels, and the purchaser at each sale was acting for the chattel mortgagee. The execution sale produced a bid of $100 and the foreclosure sale brought $500. The same chattels were sold by mortgagee

within four days after the bankruptcy for $8,500. On findings that the execution sale was preferential, that the foreclosure sale was "unfair and irregular," and that the fair market value of the property involved was $8,500, the court allowed the [p. 549] trustee to recover a sum from the chattel mortgagee representing the value it had received in excess of the debt for which it held valid security.[72] Both sales were apparently noncollusive, and the execution sale seems to have been regularly conducted. Since the foreclosure sale was held on the same day as the publication of the only notice, the purchase was made by an agent of the foreclosing mortgagee, and the bid was found to be less than 10% of the fair market value of the chattels sold, the sale did not meet a state law requirement that the mortgagee "act in good faith, obtaining as far as possible the fair

market value of the property."[73] Although the court did not invalidate the foreclosure sale as a constructive fraud, its disposition of the case was wholly consistent with that subsequently reached in Durrett.[74] Wolf is a good illustration of the utility of the broad definition of "transfer" in the Bankruptcy Act to reach both the sale on execution and the nonjudicial foreclosure.[75]

In Warner v. Dworsky,[76] the trustee in bankruptcy challenged under section 70e of the Bankruptcy Act, transfers for inadequate consideration made by the assignees for the benefit of the creditors to whom the debtor had been induced by false representations to make an assignment for the benefit o the creditors. The district court originally accepted jurisdiction of the trustee's complaint as filed,[77] The Court of Appeals for the Eighth Circuit, making an

extended review of the evolution of the Bankruptcy Act's provisions authorizing avoidance of transfers, reversed the district court's decision. Of particular pertinence to the present discussion is Judge Sanborn's statement of the [p.550] court's ratio decidendi: "Since a debtor may unintentionally and unknowingly suffer a preference, it logically follows that he may unintentionally and unknowingly suffer a fraudulent and voidable transfer of his property."[79]

p. 550]

C. The Bankruptcy Reform Act of 1978

The Bankruptcy Reform Act of 1978 eliminated the creditor's reasonable cause to believe that the debtor was insolvent as an element of a voidable preference made within ninety days of the case [p. 552] commencement,[91] and the Bankruptcy Amendments of 1984 altogether eliminated from consideration the credi-

tor's mental state in determining a voidable preference.[92] The definition of "transfer" in section 101 was shortened and simplified but continued to specify an involuntary transfer as an included mode of disposition.[93] Inasmuch as the avoidance provisions do not differentiate in any way between a voluntary transfer and a judicial lien, there is no longer a separate provision dealing with the avoidance of a judicial lien as an involuntary preference.[94]

The Bankruptcy Reform Act of 1978 retained the essential fea- [p. 553] tures of in section 548.[95] The most noteworthy departure from that Act was the replacement of fair consideration" by "reasonably equivalent value."[96] As a result, the good faith of the transferee is not an issue in determining the adequacy of the consideration exchanged for a transfer alleged to be constructively

fraudulent.[97]

III. FORECLOSURE AS A FRAUDULENT TRANSFER

A. The Durrett Decision

Although Durrett was decided in 1980, the law applied was section 67d of the Bankruptcy Act. The court followed its own construction of that section in Abramson v. Lakewood Bank & Trust Co.[98] Since Code section 548 is not significantly different from section 67d of the Bankruptcy Act, it is not surprising that many subsequent decisions have reached the same or similar results.[99] These decisions in- [p. 554] clude the ruling of the Court of Appeals for the Eighth Circuit in First Federal Savings & Loan Association v. Hulm (In re Hulm).[100]

1. Lien Enforcement as a Transfer

Disagreement with the Durrett case was not long in coming, but the dissenting

courts have adopted diverse rationales in explaining [p. 555] their rulings. The first ground of disagreement that emerged was that when a security agreement is enforced, the only operative transfer, and thus the only voidable transfer, occurs when the security interest is perfected. Where the security transfers occurs over a year before the filing of the petition by or against the debtor, the transfer is not vulnerable to avoidance under the fraudulent transfer section of the bankruptcy laws.[101] This rationale, however, took a foreshortened [p. 556] view of the relevant facts. It ignored the fact that when a security interest is enforced, a second transfer, separate from the security transfer, occurs.[102] Frequently, this transfer is to an entirely different transferee, occurs at a different time, and may be involuntary, whereas the security trans-

fer is typically voluntary, and may be for less, the same, or greater consideration than that exchanged in connection with the security transfer. The purpose of the timing provision in section 548(d)(1), like that in 547(e), is not to define a transfer or to relate its occurrence back to an earlier date. The purpose os rather to keep the voidability of a transfer from becoming barred by the running of the statute of limitations while the transfer is unperfected and therefore secret.[103] It is the second transfer that is be- [p. 557] ing challenged as fraudulent in the cases that are the concern of this Article.

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[p. 559]

2. Application of Section 548 to a Transfer by a Nondebtor

A second ground of objection to the Durrett doctrine is that a fraudulent

transfer can be committed only by a debtor. Typically this objection purports to be predicated on the language of the relevant statutory provisions. Thus the dissenting judge in Abramson v. Lakewood Bank & Trust Co., quoted in the preamble to this Article, [121] and the concurring judge in Madrid v. Lawyers Title Insurance Corp. (In re Madrid),[122] disagreed with Durrett primarily by attributing to Congress an intent not to use its own definition of "transfer" in the fraudulent transfer sections of the bankruptcy laws.[123] This basis for disagreement wit Durrett contradicts compelling evidence of congressional intent.[124]

3. Transfer Pursuant to a Noncollusive, Regularly Conducted Foreclosure Sale

A third rationale, adopted in the Madrid case by the Bankruptcy Appel-

late Panel for the Ninth Circuit, is that the amount of a bid at a noncollusive, regularly conducted foreclosure sale is the reasonably equivalent value of the property sold, as determined by reference to fraudulent conveyance law.[125] This approach has the virtue of insulating from avoidance only those transfers that occur in circumstances [p. 560] affording some assurance that a fair equivalent was exchanged. The same rationale seems to have been the principal basis for the Sixth Circuit decision in In re Winshall Settlor's Trust[126] and several other courts.[127] The factual predicate for such a judicially created presumption --permitting no rebuttal--is at best debatable.[128] A more defensible approach, and one increasingly favored by the courts and commentators, recognizes that the bid obtained at a noncollusive,

regularly conducted sale may be cogent but not conclusive evidence that the transfer was made for a reasonably equivalent value.[129]

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[p. 564

B. The Bankruptcy Amendments of 1984

Critics of Durrett and its progeny have lamented its adverse im- [p. 565] pact on the risks assumed by secured lenders and the costs and availability of credit.[144] No empirical evidence has yet been adduced to substantiate these claimed results.[145] Real estate lenders, who were among Durrett's critics, sought the inclusion of an amendment to the Bankruptcy Reform Act in 1984 which would overrule the decision.[146] Senator Metzenbaum insisted that the results attributed to Durrett should be inquired into at a hearing before congressional enactment of an amendment of section 548

that would excise its doctrine from the bankruptcy laws.[147] The efforts to engraft this amendment ironically succeeded only in causing the addition of language to the Code that precludes future misinterpretations ignoring the congressional purpose of subjecting involuntary as well as voluntary transfers to avoidance as fraudulent transfers.[148]

When the proponents of the amendment designed to subvert the Durrett doctrine complained to the legislators on Capital Hill thought to be friendly to the measure about the apparent backfire to their ef- [p. 566] forts, Senators Dole and DeConcini were persuaded to conduct a colloquy on the Senate floor to reassure disappointed observers that Congress had not intended to codify Durrett.[149] Quite apart from the inutility of legislative history to

undo what is written in enacted statutes,[150] it is well established that post-enactment comments by legislators, in or out of the legislative halls, do not constitute legitimate legislative history.[151] Insofar as Senator Dole stated that the 1984 amendments did not purport to deal with the question of whether a noncollusive, regularly conducted foreclosure sale should be deemed to be for a reasonably equivalent value,"[152] he was correct. Insofar as the two senators indicated that the amendment did not codify Durrett's interpretation of the scope of the definition of transfer and of the section avoiding fraudulent transfers,[153] they were wrong.[154] [p. 566]

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[p. 570]

IV. AVOIDANCE AS A DEBTOR'S REMEDY

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B. Redemption: Equitable and Statutory

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[p. 574]

The court in Madrid v. Lawyers Title Insurance Corp. (In re Madrid) characterized the attack on the foreclosure sale made by the debtor in possession as an attempt "to create a de facto redemption right to obtain real property previously sold at foreclosure proceedings" and rejected the effort as "clearly contrary to Nevada real property law" and unsupported by the Code.[187] The court thus ignored [p. 575] the status of the debtor in possession as a fiduciary for the creditors of the estate vested with rights, powers, and duties to avoid a range of transactions and property rights perfectly valid under applicable state law.[188] The fraudulent transfer provi-

sions of bankruptcy law and state statutory redemption statutes are directed in part against the similar evil of an injurious transfer of a valuable asset of a debtor's estate. A redemption statute, however, is designed only for protecting the debtor and creditors holding property interests in the debtor's property, where a fraudulent transfer is made voidable for the benefit of unsecured creditors who have no interests in the transferred property. Moreover, the statutory right of redemption is not dependent on a showing of the debtor's insolvency, inadequacy of consideration, or intent to defeat the rights of any party to the agreement enforced by the sale or by any third party.

* * *

V. THE DIMINISHING ROLE OF SUBJECTIVE INTENT IN DETERMINING THE VOIDABILITY OF TRANSFERS

If assertions were correct that a foreclosure sale is not a transfer within the meaning of the laws governing fraudulent transfers, collu- [p. 576] sive as well as noncollusive sales would be invulnerable to attack by creditors. To the extent that the critics of the Durrett doctrine have acknowledged the case law allowing the avoidance of collusive foreclosure sales--both judicial and nonjudicial--the cases are typically explained as a recognition that a transfer may be an intentional act of the debtor although in form and pretense it appeared to be an act of the foreclosing creditor.[191] The creditor's role is simply ignored or discounted and the debtor's is given a fictitious existence that triggers the operation of the statute.[192] So long as the applicable statute requires a transfer to be made by the debtor with intent to hinder, delay, or

defraud creditors in order to be voidable, there is a literal plausibility in a construction that rejects application to an involuntary transfer with no active participation by the debtor. As this Article has shown, however, for over 400 years the courts recognized that if fraudulent transfers are to be coped with successfully by creditors, their representatives, and the courts, a transferor's acts must be judged by their effects rather than by the words of the parties that accompany them. It is difficult to take seriously an argument that a foreclosure sale which sacrifices a valuable equity of an insolvent debtor's property should be voidable by creditors when the debtor is compliant or cooperative, but that such a sale should be invulnerable to attack by creditors when the debtor either simply defaults or is resistant but unable to forestall the loss. The

injury to creditors result from a forfeiture of an asset having significant value is equally palpable and ought to be equally remediable in any rational system without regard to the debtor's mental state, whether or not that condition is accurately assessed.

Cases avoiding fraudulent transfers on the basis that the debtor intended the natural consequences of his acts[193] largely eliminate the [p. 577] transferor's mental state as an element when the trustee or creditor attacks a transfer as one made with intent to hinder, delay, or defraud. Numerous appellate rulings that accept a finding of fraudulent intent on the transferee's part as sufficient proof of the intent requisite for avoidance [194] suggest that an involuntary transfer is voidable in a proceeding based on actual as well as constructive fraud. An argument for limiting the avoidance of fraud-

ulent transfers to those intentionally contrived by the debtor disregards what courts have been doing for many years.

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CONCLUSION

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[p. 578]

The critics of the Durrett doctrine have not yet established their claim that its application by the bankruptcy courts has had a significantly adverse impact on the cost and accessibility of secured credit. To the extent the courts in proceedings under Code section 548 are willing to give significant weight to the circumstances that afford a safe harbor to the transferee under UFTA, application of the two statutes will reach similar results. In the meantime, the vulnerability of an involuntary transfer to avoidance as a constructive fraud should encourage a lienor or lessor to exercise

care to maximize the consideration passing or to minimize the loss resulting to the debtor incident to the enforcement of rights on default.[196] The plethora of successful [p. 579] attacks on involuntary transfers as constructive frauds has focused needed attention on the unsatisfactory state of procedures for lien en- [p. 580] forcement and lease termination.[197] If the critics and supporters of Durrett can join in efforts directed toward improvement of these procedures, the final outcome of the preoccupation with the Durrett doctrine will surely be a serendipitous benefit to debtors and creditors, both secured and unsecured.

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